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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JAMES SEVO,

Defendant and Appellant.

C079112

(Super. Ct. No. P14CRF0127)

Defendant Michael James Sevo was convicted of charges related to domestic abuse of his mother, Laura Selle, and threats against her friend, Wade Connaw. On appeal, defendant challenges the postjudgment protective orders, contending they were unauthorized because they were issued pursuant to Penal Code section 136.2,¹ which authorizes only prejudgment protective orders. The People agree, and we shall vacate the

¹ Undesignated statutory references are to the Penal Code.

orders and remand the matter for the trial court to impose a protective order in favor of Selle pursuant to section 1203.097. We shall also correct the sentence with respect to counts 1, 2 and 3, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 10, 2014, defendant and Selle were living in the house of Kayo Sevo, defendant's grandmother. Defendant's girlfriend, Somer Sparks, and their then three-year-old daughter were also living in the house. That morning, defendant argued with Selle over a cup that had fallen on his foot and he threatened to beat and kill her. Selle took defendant's threat seriously. There had been prior violent incidents between the two, and defendant had previously injured Selle.

Selle tried to get away by running into Kayo's bedroom, but defendant followed her. When Selle tried to exit the room, defendant pushed her back and called her names. He put his hands on her neck and said, "I could just snap your neck."

Selle eventually ran out of the house. She could hear defendant and Kayo yelling at each other. Defendant then briefly came out of the house, yelled, "Well, if you're not going to come out of the trees . . . , [w]hat if I just go in and kill your mom," and returned inside.

Selle ran half a mile to Connow's house so she could call the police. Selle told Connow what happened and said she was afraid for Kayo. Connow called Selle's home to check on Kayo and argued with defendant, who refused to let Kayo talk with Connow. Connow and Selle called the police and drove to Selle's house to check on Kayo. It was quiet when they arrived but Selle was afraid and remained in the car. Connow got out of the car and walked up the driveway. Before Connow reached the house, defendant came out and yelled, "Oh, you think you're a big man. You're going to come up here and you're going to walk into my house." Connow responded he was concerned about Kayo.

Defendant charged at Connow, swinging a knife in his hand and saying he would kill Connow. Afraid, Connow grabbed a trash can to block defendant, gradually backed down the driveway, and returned to the car. Defendant returned to the house and Connow drove a short distance to wait for the police.

The sheriff's department arrived, set up a perimeter around the house, and used a loudspeaker to order everyone to come outside. Thirty minutes later, Sparks and her daughter exited the house. Deputies then briefly entered the home and helped Kayo outside. A few hours later, a SWAT team arrived and eventually entered the house. They found defendant hiding in a crawlspace beneath the house and arrested him.

A jury convicted defendant of criminal threats against Connow and Selle (§ 422—counts 2 & 3), misdemeanor battery of Selle (§ 242—count 4), and misdemeanor resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)—count 5). The trial court found true allegations defendant had violated probation in case No. P11CRM1210 and was out on bail in case No. P13CRF0156 when he committed the charged offenses. (§ 12022.1.)

The trial court imposed and stayed an aggregate state prison term of five years eight months and granted probation for five years, as follows: “the aggravated term on Count 1 of three years. On Count 2 it's the midterm of [two] years, one-third being eight months. . . . The Court will order that Counts 4 and 5 run concurrent. Count 4 being six months. Count 5 being one year.” The trial court imposed and stayed two years consecutive for the section 12022.1 enhancement.

The trial court also issued three-year criminal protective orders in favor of Connow and Selle.² Although the trial court did not orally state its statutory authority for the orders, the written orders identify section 136.2. Defendant appealed.

DISCUSSION

1.0 Criminal Protective Orders

Section 136.2 permits a trial court to order a defendant to stay away from a crime victim. However, the trial court has jurisdiction to issue such an order only during the pendency of the action. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382.) As courts have explained, the duration of the protective order issued under section 136.2 may not extend beyond the trial court's jurisdiction over the criminal case, unless they are issued pursuant to section 136.2, subdivision (i)(1) (hereafter section 136.2(i)(1)). (*Ponce*, at pp. 382-383; but see former § 136.2(i)(1) [permitting postconviction protective orders for victims of "domestic violence" only as defined in section 13700].)

The record indicates the orders were issued pursuant to section 136.2, rather than section 136.2(i)(1). The orders were issued on forms that gave the trial court the option to indicate either section 136.2 or 136.2(i)(1), and the trial court selected section 136.2. Moreover, the trial court lacked authority to issue either of the protective orders pursuant to the then current section 136.2(i)(1). Under section 13700, subdivision (b), as pertinent here, domestic violence is "abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." Neither Connow nor Selle meet this definition. Although Selle lived with defendant, she is defendant's mother and section 13700 defines cohabitants as "two *unrelated* adult persons living

² Connow's written order misspells his last name as "Carrow." Since we are reversing both orders, there is no need to correct this clerical error.

together for a substantial period of time” (§ 13700, subd. (b), italics added.) Accordingly, the three-year protective orders issued pursuant to section 136.2 in this case during sentencing are invalid and must be vacated. (*People v. Stone* (2004) 123 Cal.App.4th 153, 160, superseded by statute on other grounds as recognized in *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 951.)

As defendant and the People agree, vacating the existing protective orders in this case requires remand to allow the trial court to modify the probation terms pursuant to section 1203.097, which requires the trial court to impose a criminal protective order as a condition of probation if the victim is a person defined in Family Code section 6211. (§ 1203.097, subd. (a)(2).) The failure to impose mandatory probation terms under section 1203.097 creates an unauthorized sentence subject to later correction. (*People v. Cates* (2009) 170 Cal.App.4th 545, 552 [§ 1203.097 applies to all offenses not just those that inherently involve domestic violence].)

Under Family Code section 6211, domestic violence is “abuse perpetrated against any of the following persons: [¶] (a) [a] spouse or former spouse[,] [¶] (b) [a] cohabitant or former cohabitant³ . . . [,] [¶] (c) [a] person with whom the [defendant] is having or has had a dating or engagement relationship[,] [¶] (d) [a] person with whom the [defendant] has had a child . . . [,] [¶] (e) [a] child of a party . . . [,] [or] [¶] (f) [a]ny other person related by consanguinity or affinity within the second degree.”

While Connow does not meet Family Code section 6211’s definition of a victim of domestic violence, Selle does because she is defendant’s mother and cohabitant. Accordingly, a protective order is required in favor of Selle but not in favor of Connow. (§ 1203.097, subd. (a)(2).)

³ A “cohabitant,” is broadly defined as “a person who regularly resides in the household,” and is therefore not limited to unrelated persons. (Fam. Code, § 6209.)

2.0 Error in Pronouncement of Sentence

Although neither side raises this issue, the trial court erred in its oral pronouncement of defendant's sentence. Despite the jury's finding defendant not guilty of count 1 (§ 245, subd. (a)(1)), the trial court imposed "the aggravated term on Count 1 of three years. On Count 2 it's the midterm of [two] years, one-third being eight months."⁴ In addition, the trial court appears to have failed to state a term for count 3. (§ 422.)

The record indicates the trial court must have meant counts 2 and 3 (§ 422) rather than "counts 1 and 2" (§§ 245, subd. (a), 422). Although the trial court stated it was imposing and staying the upper term of three years for what it referred to as "count 1," the upper term for a violation of section 245 is four years. The upper term for a violation of section 422 is three years, indicating the trial court intended to impose and stay three years for count 2. (§ 1170, subd. (h)(1).) In addition, the trial court stated it was imposing and staying one-third of the midterm of two years for what it called "count 2." The midterm for section 422 is two years, indicating eight months was the trial court's intended term for count 3. (§ 1170, subd. (h)(1).) In the interest of judicial economy, we will strike the sentence for count 1, impose and stay three years for count 2, and impose and stay eight months (one-third the midterm of two years) for count 3. (§ 1260.)

DISPOSITION

The sentence is modified as follows: The sentence for count 1 is struck; three years is imposed and stayed for count 2; and eight months (one-third the midterm of two years) is imposed and stayed for count 3.

⁴ We find no error with the remainder of the trial court's oral pronouncement of sentence regarding counts 4 and 5 and the section 12022.1 enhancements for counts 2 and 3. (§ 242, 148, subd. (a)(1).)

The trial court's amended "Criminal Protective Order—Domestic Violence" in favor of Selle filed on March 19, 2015, and "Criminal Protective Order—Other Than Domestic Violence" in favor of Connov filed on March 17, 2015, are vacated. The matter is remanded and the trial court is directed to impose a protective order in favor of Selle and the probation terms required by section 1203.097. The clerk of the trial court is directed to forward a certified copy of the modified probation order to the El Dorado County Probation Department.

As modified, the judgment is otherwise affirmed.

BUTZ, J.

We concur:

HULL, Acting P. J.

MAURO, J.